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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

MARY M. ROGERS,
Appellant,
vs.
HENRY H. PECK, Sheriff of Windsor County, and WILSON S. LOVELL, Superintendent of Vermont State Prison,
Appellees.

368.

No. 368. October Term, 1905.

Brief in Opposition to Motion to Advance.

F. M. BUTLER,
T. L. JEFFORDS,
Counsel for Appellant.

PRESS OF BYRON S. ADAMS

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Statement.

Appellant was in Bennington County Court, Vermont, convicted of murder and sentenced to be hung February 3, 1905.

February 1, 1905, the Governor of Vermont reprieved her until June 2, 1905.

June 1, 1905, the Governor further reprieved her to June 23, 1905.

June 22, 1905, the Governor further reprieved her to December 8, 1905.

April 29, 1905, appellant was allowed by the Supreme Court to file her petiton there asking for a new trial. Hearing was had on that petition, and May 30, 1905, petition was dismissed.

June 19, 1905, appellant filed her petition for writ of habeas corpus in the United States District Court for the District of Vermont, and such writ was issued on the same day, hearing had June 21, 1905, and June 22, 1905, the writ was discharged and appellant remanded to her former custody. On the same day, and concurrent with this action by the United States District Court, the Governor of Vermont granted her the hereinbeforementioned reprieve from July 22, 1905, to December 8, 1905.

Thereupon appeal was taken to this Court.

Appellee Lovell is the Superintendent of the Vermont State Prison, which is located at Windsor, in the County of Windsor, where appellant is imprisoned, and appellee Peck is the Sheriff of Windsor County, who, under the law of Vermont, is to execute the death sentence pronounced upon Vermont convicts.

Argument.

Any person convicted of murder in Vermont may present a petition to the Supreme Court of the State asking for a new trial upon grounds stated in the petition. The petition must be presented to two of the Judges of the Supreme Court. If they shall permit said petition to be filed and hearing had thereon, it is expressly provided by the law on that subject that the two judges *shall* stay execution of death sentence until after time fixed for hearing.

Vt. Stat., Sec. 1998.

It is further expressly provided in same act that, if the Supreme Court shall, upon hearing, deny petition for new trial, it *shall* appoint a time for executing the death sentence.

Vt. Stat., Sec. 1999.
Act No. 19 of Session Laws, 1878.

Appellant was heard on such a petition, which was dismissed.

Opinion of court in dismissing petition is found in Atlantic Reporter Advance Sheets of September 7, 1905. Special attention is called to the dissenting opinion of two judges, which follow opinion of the court. This is an exceptional case, because the highest court of the State was not a court held in the county, as required by the Constitution, and had to pass upon its own status.

Judges of the Supreme Court of Vermont sit as trial judges in county courts, and sit in banc as the Supreme Court.

The same judge that sat as trial judge in the case of appellant also sat in the hearing of said petition, and delivered the opinion of the court.

Besides the trial judge, who sat with the court in banc, there were only five judges, and so the opinion of the court is in reality by three of five judges, while the law requires four.

Vt. Stat., Sec. 996.
Act No. 28 of Session Laws of 1892.
Act No. 37 of Session Laws of 1898.

Right of Appeal Denied.

Appellant was tried with a co-defendant, who testified at length for the State, but refused to answer certain material questions upon cross-examination on the ground that it would tend to incriminate him. Although a co-defendant, he has been found guilty of a less offense than murder and given a term sentence in the Vermont State Prison.

If it be asked why appellant did not take her appeal on account of errors of trial court, the answer is that the Legislature of Vermont has abolished the only court to which appeal would lie.

> Act No. 36 of Session Laws of 1898.
> Act No. 28 of Session Laws of 1892, which repealed Secs. 783, 4, 5, 7, 8 of the Revised Statutes of Vermont, fixing time and place of holding Supreme Court.

The Constitution and Laws of Vermont require a Supreme Court to be maintained in each county.

> Constitution of Vermont, Chap. 2, Sec. 4.
> State *vs.* Peterson, 41, Vt., 515, at page 518.
> Vermont Statutes, Secs. 1007, 1012.

Equal protection of the Laws Denied.

A citizen of the State of Vermont residing in Washington County, where the capital of the State is located, is provided with a Supreme Court in that county, to which appeal will lie; but this is not true of any citizen of any other county in the State.

This denies all the citizens of the State of Vermont outside of Washington County that equal right of appeal

which is guaranteed by the Constitution of the State. Chap. 2, Sec. 4. This is violation of the Fourteenth Amendment to the Constitution of the United States.

Had appellant been tried for murder by a jury of less than twelve or by a jury composed in part of known minors or known lunatics, or a verdict of murder had been rendered against her by seven of twelve jurors, there could be no doubt that she was deprived of rights guaranteed by the Fourteenth Amendment to the Constitution. Yet, were this true, she, nevertheless, would have, as in the case at bar, no redress except by coming to this Court.

No Valid Death Sentence in Force and No Law Providing Authority to Pronounce One.

The provision of the before-mentioned law for stay by Supreme Court of execution, and fixing time by same court for execution of sentence exclusively, shows that the trial court had no control over the sentence. The Supreme Court having taken jurisdiction, it alone had authority to fix the time, the time fixed by trial court having elapsed.

The Supreme Court, however, did not stay execution of death sentence and did not fix a time for carrying it into effect. It now has no jurisdiction to do so.

Sentence of trial court that appellant be executed February 3, 1905, cannot be carried into effect.

That court has no jurisdiction to pass a new sentence or fix a time for executing the death sentence it did pass. That court has adjourned without day.

There is no court or officer or person who can now lawfully pronounce sentence of death upon appellant, or can fix a time for carrying the death sentence of the

trial court into effect, or lawfully cause the death penalty to be inflicted upon her, for the offense for which she has been convicted, unlawfully as she claims.

The law of Vermont provided a way for her legal trial and execution, but those laws have not been followed, and she is now imprisoned without right or authority, and unless this Court makes available to her the guarantees of the Constitution of the United States she will be executed at some future time, about fixing the date of which she cannot be heard, although the law of Vermont provides she may be heard as to that.

The Governor of the State has granted several reprieves, and the latest one granted, June 22, 1905, after this proceeding was begun, June 19, 1905, is null and void, and of no force and effect, under Section 766 of the Revised Statutes of the United States.

Transcript Incomplete.

In discharging the writ of habeas corpus the judge of the United States District Court rendered an oral opinion, and when printed a considerable part of it was omitted. The omission was overlooked in preparing the transcript, which now contains only the abridged opinion.

Unabridged opinion is published in Advance Sheets No 7, of September 7, 1905, of Vol. 138, Fed. Rep.

Counsel for appellant think it necessary, therefore, that transcript should be amended, and unless counsel can stipulate accordingly certiorari may be necessary.

Counsel for appellant desire the Court to see amended and complete transcript before deciding this motion to advance. Reasonable time and needful orders of this Court, if found necessary, are respectfully asked.

Counsel for appellees have made a motion to advance this cause so that it may be heard and disposed of before December 8, 1905, and, as counsel for appellant think that time too short, respectfully oppose the motion to advance.

F. M. BUTLER,
T. L. JEFFORDS,
Counsel for Appellant.